IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA, (DEPARTMENT OF ADMINSTRATIVE SERVICES, HUMAN RESOURCE ENTERPRISE), **Petitioner,** **vs.** **PUBLIC EMPLOYMENT RELATIONS BOARD,** **Respondent,** **& AFSCME IOWA COUNCIL 61,** **Intervenor.**	**Case Number CV 5224** **RULING ON PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

The above captioned matter came before the Court on October 27, 2005, on the Petitioner's Petition for Judicial Review. The Petitioner, the State of Iowa, was represented by Robert K. Porter. The Respondent, Public Employment Relations Board, was represented by Jan V. Berry. After hearing the arguments of counsel and reviewing the court file, including the briefs and the Certified Administrative Record, this Court now enters the following ruling:

STATEMENT OF FACTS

Prior to August 2002, the State of Iowa (hereinafter the "State") conducted an interdepartmental investigation to find state employees who improperly used the email system. This investigation resulted in the discipline and/or discharge of a number of state employees. Some of these state employees were bargaining unit employees represented by the American Federation of State, County and Municipal Employees (hereinafter "AFSCME"). AFSCME is

the Public Employment Relations Board's (hereinafter "PERB" or the "Board") certified exclusive bargaining representative for a number of bargaining units of employees of the State.

During the time in question, AFSCME and the State were parties to a collective bargaining agreement affecting these bargaining units. This collective bargaining agreement contained a provision requiring "just cause" for employee discipline and discharge. A grievance procedure was also contained in the collective bargaining agreement culminating in final and binding arbitration of disputes arising under the contract.

AFSCME ended up filing at least 12 grievances contesting the disciplining, including discharge in some instances, of bargaining unit employees regarding this email system investigation. One grievance submitted by AFSCME was filed on behalf of James Jones. Mr. Jones was a state employee who was terminated for the alleged distribution or storage of email containing "adult humor." In order to investigate this grievance, AFSCME requested information concerning the email usage of and discipline (if any) imposed on two supervisors in Mr. Jones' department of employment. In response to AFSCME's request, the State denied them access to this information. Thus, AFSCME filed a complaint (PERB Case No. 6541).

At some point, AFSCME learned that the State's investigation had also extended to other supervisory and non-collective bargaining employees of the State. Therefore, AFSCME began to suspect that AFSCME represented employees might have received disparate disciplinary treatment in comparison to these other employees. Thus, AFSCME requested information concerning supervisory and other non-contract employees who had been investigated for alleged improper email use. The State refused this request because it pertained to employees not represented by AFSCME. However, the State did represent to the union that an "enterprise approach" had been taken in the investigation. Thus, the State maintained that all discipline

imposed was fair and that proper discipline had been given regardless of whether the employee was represented by AFSCME or not. AFSCME proceeded to file another complaint against the State of Iowa (PERB Case No. 6546).

Prior to hearing these two complaints, PERB consolidated these two contested cases (PERB Case Nos. 6541 & 6546) brought by AFSCME/Iowa Council 61 against the State. Both of these complaints by AFSCME asserted that the refusal by the State of the requested information constituted prohibited practices within the meaning of portions of Iowa Code section 20.10. Following an evidentiary hearing, a PERB Administrative Law Judge (hereinafter "PERB ALJ") concluded that the State did not commit a willful violation and thus a prohibited practice within the meaning of Iowa Code section 20.10. However, the PERB ALJ found that AFSCME had established that the State violated its Iowa Code section 20.9 bargaining duty and subsequently committed an ordinary violation. Ultimately, the ALJ ordered the State to provide AFSCME with most of the information it had requested, subject to a detailed restrictive protective order.

The State then filed a timely intra-agency appeal from the PERB ALJ's proposed decision and order. After reviewing the submitted briefs and oral arguments from the parties, the PERB concurred with the PERB ALJ's proposed decision and order. The State applied for a rehearing by the agency. The PERB denied the rehearing. Thus, the State subsequently filed this present proceeding for judicial review of the PERB decision. The PERB was the initial Defendant in this action. However, on July 30, 2004, AFSCME Iowa Council 61's Renewal of Motion to be Joined and Intervene as Party Defendant was granted by the Honorable Judge Reis. Therefore, AFSCME is an Intervenor in this present petition for judicial review.

STANDARD OF REVIEW

On judicial review of an agency action, the District Court functions in an appellate capacity. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). Judicial review of a final agency action is governed by application of standards set out in Iowa Code § 17A.19 (2003). The Court will inquire whether the petitioner's rights have been prejudiced by an agency decision that is unreasonable, arbitrary or capricious, or which lacks substantial evidentiary support in the record. *Id.* Thus, the Court may reverse, modify, or grant other appropriate relief only if the agency's action is affected by error of law, is unsupported by substantial evidence in the record, or is characterized by an abuse of discretion. *Burns v. Bd. Of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993).

The District Court's review is limited to corrections of errors of law and is not de novo. *Second Injury Fund v. Klebs*, 539 N.W.2d 178, 180 (Iowa 1995); *Harlan v. Iowa Div. Of Job Serv.*, 350 N.W.2d 192, 193 (Iowa 1984). An agency's factual findings must stand if supported by substantial evidence when the record is viewed as a whole. *Sierra v. Employment Appeal Bd.*, 508 N.W.2d 719, 720 (Iowa 1993). Evidence is substantial if a reasonable person could accept it as adequate to reach the same findings. *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 723 (Iowa 1994); *Suluki v. Employment Appeal Bd.*, 503 N.W.2d 402, 404 (Iowa 1993). Not only must the agency's final decision be supported by substantial evidence, the agency must also be correct in its conclusions of law. *Glowacki v. Iowa Bd. Of Medical Examiners*, 516 N.W.2d 881, 884 (Iowa 1994). It is ultimately the duty of the Court to determine matters of law, including the interpretation of a statute, or an agency rule interpreting a statute. *Hollinrake v. Iowa Law Enforcement Acad.*, 452 N.W.2d 598, 601 (Iowa 1990).

Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the Court must give appropriate deference to the agency's findings. *Aluminum Co. v. Employment Appeal Bd.*, 449 N.W.2d 391, 394 (Iowa 1989). The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Munson*, 513 N.W.2d at 723; *Brockway v. Employment Appeal Bd.*, 469 N.W.2d 256, 258 (Iowa 1991). Moreover, "the fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence." *Id.* (citing *Henry v. Iowa Dept. of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App.1986)).

ANALYSIS

The State raises several arguments in their petition for judicial review. First, the State claims the Public Employment Relations Board (hereinafter the "Board") misallocated the burden of proof in this matter. Second, the State contends it was error for the Board to grant a remedy in a case where the Board found that no prohibited practice had occurred. Third, the State argues the information requested by AFSCME concerning disciplining of supervisory employees is not relevant to any issue in the underlying grievance. Each of these arguments will be discussed *infra*.

In the case at hand, AFSCME filed two complaints with the Board against the State based on Iowa Code sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006). Iowa Code section 20.10 (2006) is entitled prohibited practices. Iowa Code sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006) state as follows:

> 2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:
>
> a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

b. Dominate or interfere in the administration of any employee organization.
f. Deny the rights accompanying certification or exclusive recognition granted in this chapter.

The Board began its analysis by citing to *Greater Community Hospital v. Public Employment Relations Board* where the Iowa Supreme Court adopted the Board's previous stance that a "public employer has a duty to provide information that (1) is clearly specified, (2) may be relevant to the bargaining process, and (3) is not otherwise protected or privileged." 553 N.W.2d 869, 871 (Iowa 1996) (citing *Washington Educ. Ass'n*, PERB Case No. 1635 (1980)). In the case at hand, the Board further found the information requested by AFSCME was not protected or privileged.[1] Therefore, the Board concluded that the State violated chapter 20 of the Iowa Code when it refused to disclose the requested information to AFSCME.

The State argues that the Board misallocated the burden of proof in this matter by making the State disprove the relevance of the material, instead of making AFSCME prove the relevance of their need to obtain this information. The State further contends that it is not mandated by Iowa Code section 20.9 (2006) to furnish this information to the Union. Instead, the furnishing of this information is a permissive action by the State. Thus, the State should not be found to have committed a prohibited practice based on the refusal to bargain with AFSCME over permissive subjects.

This Court agrees with the Board's analysis and interpretation of this part of the decision. As noted *supra*, the Board cited to the *Greater Community Hospital* case where the Iowa Supreme Court found refusal to produce information (salary data) during collective bargaining negotiations with its employees' union amounted to a prohibited practice under Iowa Code

[1] The State maintained the records were confidential pursuant to Iowa Code section 19A.15 and Iowa Administrative Code section 17.14(1). The Board determined the provisions had no applicability in the case at bar because AFSCME is not the general public seeking the records but a certified employee organization. Furthermore, the Board found the information was relevant to the processing of represented employees' grievances.

section 20.10 (2006). *Id.* at 870. The Iowa Supreme Court then set out the three part test as noted *supra* to determine if the public employer had a duty to provide the requested information. This Court finds this analysis used by the board in applying this three part test to the case at hand was not in error. This Court also agrees the use of this three part test in negotiation proceedings can be analogous to the use of this test in grievance proceedings. *See N.L.R.B. v. Acme Industrial Company*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 568 (1967). Furthermore, in the Board's analysis of the "maybe relevant" three part test, the Board elaborately discusses the union's reasons for demonstrating the information was relevant to their grievance investigation. Thus, the Board placed the burden of proof in establishing the relevancy of the information on AFSCME and not on the State.

This Court also agrees with the Board's reasoning that grievance proceedings can be included in Iowa Code section 20.9 (2006) entitled scope of negotiations. Iowa Code section 20.9 (2006) gives a list of activities that can occur during negotiations between the public employer and the employee organization. Iowa Code section 20.9 (2006) states at the end of this list "and other matters mutually agreed upon." It is conceivable that negotiations can include labor-management negotiations during the term of the collective bargaining agreement. *See N.L.R.B.*, 385 U.S. at 436, 87 S.Ct. at 568. This is especially conceivable in the case at bar since AFSCME had a collective bargaining agreement with the State and was authorized to handle grievance procedures (such as discipline and discharge) of their members.

Therefore, this Court agrees with the Board's analysis and application of facts in this part of the Board's decision. As an added note, although the Board found the information met the "maybe relevant" standards and should have been disclosed to AFSCME; the Board further found that the State's actions did not meet the willful violation standard. Therefore, this

argument is somewhat purposeless in relation to this Court's findings *infra* because the State was ultimately found not to have willfully violated a prohibited practice.

Next, the Board considered whether this violation by the State met the prohibited practice requirements in Iowa Code section 20.10(2) (2006). The Board started its analysis by interpreting the term "willfully" contained in Iowa Code section 20.10(2) (2006) to assist in determining if the State actually committed a prohibited practice. In order to interpret the term "willfully" the Board referenced the Iowa Supreme Court's decision in *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters v. Iowa Public Employment Relations Board.* In *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters*, the court found the word willful to mean "that a party either knew or showed reckless disregard for the matter of whether its action amounted to a refusal to negotiate in good faith with respect to the scope of negotiations under section 20.9." 522 N.W.2d 840, 843 (Iowa 1994). Further, the Board applied this definition of willful to the facts of the case and found that the State did not commit a willful prohibited practices violation. Specifically, the Board found no evidence in the record to suggest that the State acted in reckless disregard for the matter of whether its conduct was prohibited by the statute. This Court agrees with the Board's analysis and application of facts in this part of the Board's opinion. Furthermore, there is substantial evidence to support the Board's analysis.

After the Board determined that the State did not commit a willful violation of Iowa Code

sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006)[2], the Board proceeded to find the State did commit an ordinary violation and subsequently remedied the situation under Iowa Code section 20.1(3) (2006). Iowa Code section 20.1(3) (2006) gives the Board certain powers and duties such as the following:

> Fashioning appropriate remedial relief for violations of this chapter, including but not limited to the reinstatement of employees with or without back pay and benefits.

In the end, the Board ordered the State to provide AFSCME with the documents and information requested (with the exception of the requested employee performance evaluations). Furthermore, the Board listed terms and conditions for both parties to follow to ensure the documents and information remained confidential while in the possession of AFSCME.

This Court will first address the Board's use and application of the ordinary violation principle. In its decision, the Board references the *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters* case in support of its claim that Iowa courts have adopted the ordinary violation principle. The Board specifically refers to the following language where the Iowa Supreme Court references a U.S. Supreme Court opinion[3], "The Supreme Court made it clear that Congress, by using the word "willful," intended to distinguish between ordinary violations and those that were willful." *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters*, 522 N.W.2d at 843. As noted by the Board, the U.S. Supreme Court was looking to the Fair Labor Standards Act (FLSA), specifically the statute of limitations periods, when it made the distinction between willful and

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[2] In the Board's brief, the Board claims it remedied an ordinary violation of the duty to bargain imposed by Iowa Code section 20.9 (2006) and not Iowa Code section 20.10 (2006). This Court finds the Board's argument is not plausible and will analyze the State's second argument under Iowa Code sections 20.10 (2006) because 1) that is the statute claimed to have been violated by the Petitioner, 2) 20.9 and 20.10 are interrelated as 20.10 acts as the enforcement arm of 20.9 and 3) there is no willful language in 20.9 and the Board cannot read in the willful violation language to 20.9 without some authority, instead, as just stated 20.10 is the enforcement arm of the two statutes and must be used in analyzing the willful vs. ordinary violation disagreement between the parties. *See* Iowa Code sections 20.9 and 20.10 (2006).

[3] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132, 108 S. Ct. 1677, 1681 (1988).

ordinary violations. *McLaughlin v. Richland Shoe Company*, 486 U.S. 128, 132-33, 108 S.Ct. 1677, 1681 (1988).

This Court finds the Board was in error in finding the State guilty of an ordinary violation for several reasons. First, this Court does not find that Iowa courts have adopted the ordinary violation principle in the reading of *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters* or in any other case law. This Court does acknowledge that, in *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters*, the Iowa Supreme Court states, "Obviously, every breach of the bargaining statute would not automatically rise to this level [the level of a willful violation]." 522 N.W.2d at 843. However, there is no indication that the Court did anything in *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters* but adopt the "willful" definition from the U.S. Supreme Court's interpretation of the FLSA. *See Id.* This Court cannot find that just because some of the violations fail to elevate to the level of a willful violation means that the Iowa Supreme Court adopted the ordinary violation principle for all other violations. *See Id.*

Second, the statutory interpretation of Iowa Code sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006) does not allow for ordinary violations. Iowa Code section 20.10 (2006) only provides relief for prohibited practices that are willfully violated. "In construing statutes the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." *Uni-United Faculty v. Iowa Public Employment Relations Board*, 545 N.W.2d 274, 280 (1996) (citations omitted). Furthermore, "interpretation of a statutory provision is a question of law which is within the province of the court to decide, but the court will give weight to an agency's construction of the statute so long as the agency does not purport

to make law or to change the legal meaning of the law." *Burlington Community School District, v. Public Employment Relations Board*, 268 N.W.2d 517, 521 (Iowa 1978) (citation omitted).

In strictly construing, Iowa Code sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006), this Court finds no mention of an ordinary violation. *See* Iowa Code §§ 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006). Instead, the statute only mentions relief from willful violations as noted by the following language, "It shall be a prohibited practice for a public employer or the employer's designated representative willfully to." Furthermore, the preceding paragraph in Iowa Code section 20.10 (2006) also reinforces the fact that relief can only be given for willful and not ordinary violations. Iowa Code section 20.10(1) (2006) states as follows:

> It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.

Based on the strict statutory interpretation of Iowa Code sections 20.10(2)(a), 20.10(2)(b) and 20.10(2)(f) (2006), this Court finds the Iowa Legislature did not intend to provide relief for ordinary violations.

Furthermore, since this Court has found no ordinary or willful violation, then there is no longer any need to use and apply the remedial statute (Iowa Code section 20.1(3) (2006)) as the Board did to allow the release of all the requested information except for the performance evaluations.

Finally, the State raises one other argument in this petition for judicial review. The State contends the information requested by AFSCME concerning the disciplining of supervisory employees is not relevant to any issue in the underlying grievance. The State further argues that the supervisory and non-supervisory employees were not similarly situated and thus there was no need for AFSCME to get information about the supervisory employees (Mr. Jones was a non-

supervisory employee of the state) to investigate their grievance of disparate treatment of state employees. This argument relates to the remedial provisions utilized by the Board to permit the release of most of the information requested by AFSCME. Therefore, this Court does not need to discuss and analyze this argument since the State has been found not to have committed any prohibited practices and thus not ordered to release these records as a result of this action.

In conclusion, this Court finds that the Board committed error when it found the Petitioner guilty of an ordinary violation and allowed for the release of most of the requested information. This Court is not saying that the information cannot be relinquished in some other manner as suggested in the Board's decisions and the briefs by the parties to this action. This Court is simply holding that the Board did not have power to invoke the punishment of an ordinary violation on the Petitioner when it previously found that the Petitioner did not commit a willful violation. Thus, the decision by the Board is reversed.

ORDER

IT IS THE ORDER OF THE COURT that the Decision of the Public Employment Relations Board is **REVERSED**.

IT IS SO ORDERED this 6th day of February, 2006.

SCOTT D. ROSENBERG, JUDGE
Fifth Judicial District of Iowa

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